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IN THE Supreme Court of the United States

October Term, 1963
No. 372

SOUTH COAST FISHERIES, INC., a California corporation,
Plaintiff and Appellant,

vs.

DEPARTMENT OF FISH AND GAME,
Defendant and Appellee.

STAR-KIST FOODS, INC., a California corporation, FRANCO ITALIAN PACKING CO., a California corporation, VAN CAMP SEA FOOD CO., INC., a California corporation, and MARINE CURING AND PACKING CO., a California corporation,
Plaintiffs and Appellants,

vs.

DEPARTMENT OF FISH AND GAME,
Defendant and Appellee.

On Appeal From the California District Court of Appeal, Second Appellate District, Division Two.

MOTION TO DISMISS OR AFFIRM.

STANLEY MOSK,
Attorney General of the State of California,
DAN KAUFMANN,
Assistant Attorney General,
NEAL J. GOBAR,
Deputy Attorney General,
600 State Building,
Los Angeles 12, California,
Counsel for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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MOTION TO DISMISS OR AFFIRM.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal or to affirm the judgment of the District Court of Appeal of the State of California for the following reason:

There is no substantial federal question presented as a basis of jurisdiction in this Court inasmuch as the questions presented have been foreclosed by previous decisions of this Court.

Statement of the Case.

Appellants brought this action seeking to recover a refund of certain taxes paid to the State of California under the provisions of the California Fish and Game Code, on the ground that the payment of the taxes in this instance violated the Import-Export Clause of the federal constitution. The case was tried on stipulated facts (Jurisdictional Statement, Appendix B, p. 1b) and on the depositions of two of appellants' employees taken by the appellee. The trial judge, after trial, made the following findings:

> "At all times involved in these actions the business of processing and canning fresh and frozen fish was carried on by the plaintiffs, and each of them, solely and exclusively at their respective plants located on Terminal Island in the City of Los Angeles, County of Los Angeles, State of California.
>
> "The taxes imposed by the defendant and involved in these actions were measured by the poundage of fish actually consumed by the plaintiffs in their processing and canning operations at their respective plants on Terminal Island.
>
> "At the time the taxes involved in these cases were imposed, the fish, the poundage of which formed the measure of said taxes, had been received and committed to supply, and were essential to, the current operating needs of the plaintiffs in their respective California canning operations.
>
> "At the time the taxes involved in these cases were imposed, the fish, the poundage of which

> formed the measure of said taxes, had been handled and acted upon to the extent that they were no longer in the original form or condition in which they arrived at the Port of Los Angeles." Jurisdictional Statement, Appendix B, p. 12b.

Accordingly, he concluded that the Import-Export Clause was not violated and awarded judgment to the appellee.

An appeal was taken to the California District Court of Appeal which affirmed the judgment. It concluded that the tax, the application of which had been questioned, is a privilege tax imposed upon those who would conduct the business activity of packing and processing fish in California. Jurisdictional Statement, Appendix A, p. 6a. It further concluded that the fact that the measure of the tax was determined by the poundage of fish used in this activity did not constitute a violation of the Import-Export Clause notwithstanding that a portion of that measure in the instant case included the poundage of fish which originated from Japan. Jurisdictional Statement, Appendix A, p. 7a. In view of this conclusion it did not deem it necessary to pass upon appellee's contention that the fish had so been acted upon following their receipt by appellants as to lose their distinctive character as imports. Jurisdictional Statement, Appendix A, p. 10a.

See:

Gulf Fisheries Co. v. MacInerny, 276 U. S. 124, 48 Sup. Ct. 227.

Appellants petitioned the California Supreme Court for a hearing which was denied. This appeal to the United States Supreme Court followed.

California Statutes Involved.

The California statute which has been questioned is section 8045 of the California Fish and Game Code, which reads as follows:

> "Every person operating under a license issued pursuant to this article shall, in addition to the license fee, pay the following privilege tax:
>
> "(a) Five Cents ($0.05) for each hundred pounds, or fraction thereof, of fish other than salmon purchased, received, or taken by him.
>
> "(b) In the case of a person who receives salmon from fishermen one-half cent ($0.005) per pound based on the weight of the salmon in the round.
>
> "Fish so taken or received, other than salmon, mollusks, and crustaceans, which are utilized for human consumption in a fresh state shall not be subject to the tax."

Section 8045 appears in division 6, part 3, chapter 1, article 7 of the Code (sections 8040-8070). Article 7 itself is entitled "Packing and Processing Licenses and Taxes". The sections comprising the article deal with the requirements of a license, license taxes and fees, and use of funds. Pertinent sections of the California Fish and Game Code to be referred to hereinafter are listed in Appendix to this reply.

Statement of the Facts.

The facts are recited in the opinion of the District Court of Appeal. Jurisdictional Statement, Appendix A, pp. 3a-5a. While the depositions are not a part of this record, the testimony given corroborated that from the time of landing, the whole scope and purpose of appellant's activities was directed to the immediate processing and canning of the fish, and that storage and the icing of the fish was directed to this end.

Summarized, the salient facts are as follows.

Appellants are California corporations licensed to process and can fish. The taxes which they paid were self-assessed, reported and paid to the State on the basis of five cents ($0.05) per hundred pounds of fish received and processed. The fish received and processed were yellowfin, bigeye, skipjack, tuna and albacore. No distinction was made based upon the original source of the fish, and the only poundage reported was that actually processed by the appellants. The state has not attempted to include in the measure of the tax the poundage of fish resold without being processed. All of the poundage reported was of fish received for current inventory needs and immediate processing. The measure of the tax was not determined until the fish had been received at the cannery and were committed to the canning process.

On page 12 of their Jurisdictional Statement appellants recite alleged facts concerning the legislative intent in adopting the law. There is no evidence in the record to support these statements, which are also refuted by the provisions of the law itself. The tax is imposed on the privilege of engaging in the local activity of processing and canning of fish. Under section 8056 the monies collected are used to patrol and inspect packing plants. This again emphasizes the non-discriminatory nature of the tax since it is obvious that the greater the activity of the appellants in processing and canning fish, the greater the expense in patroling and inspecting.

ARGUMENT IN SUPPORT OF MOTION.

THE QUESTIONS ARE NOT SUBSTANTIAL.

1. The California District Court of Appeal Correctly Interpreted Section 8045 as a Privilege Tax on the Local Activity of Processing and Canning of Fish Measured by Poundage.

The rule is too well settled to permit of question that the United State Supreme Court not only accepts but is bound by the construction given to state statutes by state courts.

Aero Mayflower Transit Co. v. Commrs. of Montana, 332 U. S. 495, 499-500, 68 Sup. Ct. 167 (1947);

Cramp v. Board of Pub. Inst., Orange County, Fla., 368 U. S. 278, 285, 82 Sup. Ct. 275 (1961);

Richfield Oil Corp. v. State Bd. of Equalization, 329 U. S. 69, 84, 67 Sup. Ct. 156 (1946);

Clement National Bank v. Vermont, 231 U. S. 120, 134, 34 Sup. Ct. 31 (1913).

In its opinion the California District Court of Appeal determined from the language of section 8045 that it imposes a privilege tax upon the local activity of processing and canning of fish and that the tax is measured by the poundage of fish received and used for this activity. The principles of statutory construction which it applied (Jurisdictional Statement, Appendix A, p. 6A) are those which the United States Supreme Court applies.

Sinclair Refining Company v. Atkinson, 370 U. S. 195, 215, 82 Sup. Ct. 1328 (1962);

United States v. National Dairy Corp., 372 U. S. 29, 32, 83 Sup. Ct. 594 (1963);

Lynch v. Overholser, 369 U. S. 705, 710-711, 82 Sup. Ct. 1063 (1962);

Local No. 8-6, Oil, Chem. & Atom. Wkrs. v. Missouri, 361 U. S. 363, 370, 80 Sup. Ct. 391 (1960);

Communist Party of United States v. Sub. Act. Cont. Bd., 367 U. S. 1, 71-72, 81 Sup. Ct. 1357 (1961).

The District Court of Appeal's conclusion is supported by the fact that the California Legislature denominated the tax a privilege tax and placed it under an article of the Fish and Game Code entitled "Packing and Processing Licenses and Taxes". Its companion sections provide for the procuring of a license for this activity (section 8040), for the rights conferred under the license and its term (section 8041), for an annual fee (section 8044), for the keeping of records (section 8043), for the imposition of this privilege tax (section 8045), for the reporting and paying of such tax (section 8047), for the collection of such tax (sections 8048-8052), and for the use of the funds collected by such tax (section 8056). Under the language of section 8045 the tax is required to be paid only by persons operating under a license for canning or processing, and the tax is paid in addition to the license fee. Insofar as the species of fish involved in this case is concerned, the poundage of fish utilized for human consumption in a fresh state is excluded from the measure. The measure includes only the poundage of fish utilized in canning or processing.

The legislative history of section 8045 also supports this construction. It was adopted in 1917, California Statutes, 1917, chapter 687, p. 1275. The original statute was entitled "An act to license canners, curers, preservers and packers of fish . . . and providing revenue therefrom . . ." and excepted from its coverage ". . . fish . . . for human consumption in its fresh state." It has remained substantially unchanged during this period, and has never been challenged until this case.

The conclusion of the District Court of Appeal is in accord with decisions of this Court which have pointed out the distinction between privilege or indirect taxes and direct taxes.

See:

Canton R. Co. v. Rogan, 340 U. S. 511, 71 Sup. Ct. 447 (1951);

Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342 (1910);

Storaasli v. State of Minnesota, 283 U. S. 57, 51 Sup. Ct. 824.

It is also consistent with other state court decisions.

See:

State v. Parker, 59 So. 741 (Ala. Ct. Appeals 1912);

Appelgarth v. State, 42 Atl. 941 (Md. Ct. Appeals 1899);

Barataria Canning Co. v. State, 58 So. 769 (Miss. Sup. Ct. 1912);

State v. Franklin, 98 P. 2d 724 (Ore. Sup. Ct. 1940);

State v. Jutstrom Fish Co., 39 P. 2d 353 (Ore. Sup. Ct. 1934).

Appellants place unwarranted emphasis upon the word "received", ignoring the elementary rules of statutory construction and attempting to isolate it out of context. But even this approach has been rejected by this Court in *J. Bacon & Sons v. Martin*, 305 U. S. 380, 59 Sup. Ct. 257 (1938). In that case an appeal from the Court of Appeals of Kentucky was dismissed for want of a substantial federal question. In so doing the Court relied upon the interpretation placed upon the word "receipt" by the Kentucky court as not being used in a limited sense, but in the sense that the property involved had already been received by the retailer and was, therefore, being used by him. In the instant case the measure of the tax was not determined until the fish were committed to the local activity, and under the law and the facts there is no basis for appellant's argument.

2. Under Decisions of This Court the Tax Challenged By the Appellants Does Not Violate the Import-Export Clause of the Federal Constitution.

In *Canton R. Co. v. Rogan*, 340 U. S. 511, this Court considered the validity of a Maryland statute imposing a franchise tax on railroad companies measured by gross receipts. The plaintiff railroad company operated entirely within the City of Baltimore and was engaged in the business of moving import and export freight to and from the harbor. It was contended by the plaintiff that to include the gross receipts from its handling of import and export freight within the measure of the state franchise tax would violate the provisions of the Import-Export Clause. In rejecting this contention, this Court held that the tax

was not upon the articles of import and export; rather, it was a tax upon the business of handling these articles and as such did not violate the Import-Export Clause. In reaching this conclusion, the Court stated (340 U. S. at p. 515):

> "To export means to carry or send abroad; to import means to bring into the country. *Those acts begin and end at water's edge.* The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would hauling them to or from distant points or perhaps mining them *or manufacturing them.* . . ." (Emphasis added.)

While the Court left open the question of whether loading for export or unloading for import is immune, it concluded (340 U. S. at p. 515) "that any activity more remote than that does not commence the movement of the commodities abroad *nor end their arrival* and therefore is not a part of the export or import process." (Emphasis added.)

In the instant case the California statute imposes a tax upon a local activity and measures the tax by the poundage of fish received and utilized in that activity. At the time the measure is determined, the fish have been committed to the local processing activity. The time for the determination of the measure is long past the point of "unloading for import". It is not a tax upon the fish as imports or upon the gross receipts

from their sale. The tax is as much beyond the "range of immunity" as the tax in the *Canton* case.

The cases of *Youngstown Sheet & Tube Company v. Bowers,* consolidated with *U.S. Plywood Corp. v. City of Algoma,* 358 U. S. 534, 79 Sup. Ct. 383 (1959) involved the imposition of a property tax. At the time of the imposition of the tax the property had been received from a foreign country to supply the manufacturer's current operating needs, *i.e.,* the goods were necessarily required to be kept on hand to meet the current operating needs of the manufacturer. This Court held that the property was subject to state taxation because under the above facts the property was in effect being used for the purpose for which it was imported.

The rationale of the decision was that the Import-Export Clause was designed to prevent seaboard states from levying taxes upon imports destined for inland states, which taxes would discriminate against inland states and put them in a position of competitive disadvantage. In the cases under consideration, since the goods were not intended to be transshipped into other states but were intended to be used by the companies in their respective manufacturing operations, this purpose or design was not frustrated.

This rationale is equally applicable here. The uncontradicted evidence shows, and the trial court so found, that the fish had been received and committed to supply and were essential to, the current operating

needs of the appellants in their respective canning operations. It is respectfully submitted that the following language from the above cases is controlling in the instant case (358 U. S. at pp. 549-550):

> "The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to taxation as the other. In those circumstances, the tax was not on 'imports,' nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place in the same way for the same use. *We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers.*" (Emphasis added.)

Conclusion.

Inasmuch as the opinion of the California District Court of Appeal is consistent with and correctly applies the principles laid down by this Court, and inasmuch as appellants' contentions concerning violation of the Import-Export Clause of the Constitution have been foreclosed by prior decisions of this Court, appellee respectfully submits that this appeal should be dismissed, or in the alternative, that the Judgment of the District Court of Appeal should be affirmed.

STANLEY MOSK,
Attorney General of the State of California,

DAN KAUFMANN,
Assistant Attorney General,

NEAL J. GOBAR,
Deputy Attorney General,
Counsel for Appellee.

APPENDIX

California Fish and Game Code.

§ 8019. "Any person operating under a fish canners and processors license or a wholesale fish dealers and preservers license shall report monthly to the department the total amount of fresh fish, in pounds, purchased, received, or taken by him for purposes other than human consumption in a fresh state, and of mollusks and crustaceans purchased, received, or taken by him during the preceding month, whether they are used fresh or otherwise."

§ 8020. "Blanks for the report required by Section 8019 shall be furnished by the department.

"The report shall be rendered to the department not later than 15 days after the end of each month. It shall be accompanied by a statement of the licensee, or of someone on his behalf, to the effect that the report is true and correct. No person shall render any report that is not true and correct."

§ 8040. "Every person engaged in any of the following businesses shall procure a license for each plant or place of business in which he so engages:

"(a) Canning, curing, preserving, packing, or dealing at wholesale in fish taken from the waters of this State or brought into this State in a fresh condition. . . ."

§ 8041. "The licenses entitle the holders thereof to can, cure, preserve, or pack fish, . . . from July 1st

to June 30th of the year following, or, if issued after the beginning of such term, for the remainder thereof."

§ 8042. "The annual fees for licenses issued pursuant to this article are:

"(a) For a fish canners and processors license issued to any person engaged in canning fish, except frozen or cold-pack crustaceans, or manufacturing fish scraps, fish meal, fish oil, chicken feed, fertilizer, or other products from fish or fish offal, seventy-five dollars ($75). . . ."

§ 8043. "Every person operating under a license issued pursuant to this article, and every other person dealing in fresh fish, shall keep a book or books in which shall be entered:

"(a) A full and correct record, in the English language, of all fresh fish purchased or received by him from fishermen or taken by himself.

"(b) The names of the different species.

"(c) The number of pounds so received or caught of each different species.

"(d) The name and address of the person from whom such fish were received.

"The books shall be open at all times for inspection by the department."

§ 8047. "Privilege taxes imposed by this article shall be paid monthly to the department within 30 days after the close of each month.

"If any tax is not paid within 60 days after the close of the month for which it is due, a penalty equal to 10 percent of the tax shall be added to it."

§ 8048. "If any privilege tax imposed by this article is not paid when due, the department may, within three years after the due date, file for record in the office of any county recorder a certificate specifying the amount and penalty due, the name and address, as it appears on the records of the department, of the person liable for the tax, and the fact that the department has complied with all provisions of this article in the determination of the amount required to be paid."

§ 8049. "From the time of the filing for record, the amount required to be paid and any penalty added to it, constitutes a lien upon all real property in the county then owned by the person liable or thereafter, and before the expiration of the lien, acquired by him."

§ 8050. "The lien has the force, effect, and priority of a judgment lien, and shall continue for five years from the time of the filing of the certificate, unless sooner released or otherwise discharged."

§ 8051. "The lien may, within five years from the date of the filing of the certificate, or within five years from the date of its last extension, be extended by filing for record a new certificate in the office of the county recorder of the county, and from the time of such filing the lien shall be extended to the real property in such county for five years, unless sooner released, or otherwise discharged."

§ 8052. "The department may at any time release all or any portion of the property subject to any lien provided for in this article from the lien or subordinate the lien to other liens and encumbrances, if it determines that the amount of tax and any penalty added are sufficiently secured by a lien on other property or that the release or subordination of the lien will not jeopardize the collection of the tax and penalty."

§ 8056. "Except as otherwise provided in this article, all moneys collected pursuant to this article shall be paid to the department, and shall be expended for the patrol of packing plants, inspection and regulation of the fishing industry, and conservation work for the benefit of the commercial fishing industries."